2000

State of Utah v. Gus William Simpson : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent,	)	
-v-	)	Case No. 14004
GUS WILLIAM SIMPSON, Defendant-Appellant.	)	

APPELLANT'S BRIEF

Appeal from the Judgment of the
Seventh District Court for San Juan County
Honorable Edward Sheya, Judge

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TABLE OF CONTENTS

AUTHORITIES CITED

Cases

Statutes

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	
	)	
-v-	)	Case No. 14004
	)	
GUS WILLIAM SIMPSON,	)	
	)	
Defendant-Appellant.	)	

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is a criminal case wherein the appellant appeals from a conviction of illegal possession of a controlled substance with intent to distribute for value.

DISPOSITION IN THE LOWER COURT

This matter came before the Honorable Edward Sheya, Judge of the District Court for San Juan County, sitting without a jury, on the 3rd and 4th days of December, 1974. The court took this matter under advisement for approximately one month; then, on the 15th day of January, 1975, the appellant was found guilty of illegal possession of a controlled

substance with intent to distribute for value. On the 19th day of February, 1975, the appellant was sentenced for not more than five years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of his conviction because (1) the marijuana seized by the state police officers was the product of an illegal search and seizure; (2) the appellant was interrogated while in custody without being informed of his rights under the Fourth and Fifth Amendments of the United States Constitution; and (3) the Utah courts lack jurisdiction to convict the appellant of the crime for which he was charged and convicted.

STATEMENT OF THE FACTS

On or about the 15th day of May, 1974, the appellant was piloting a small single-engine aircraft from Mexico to Idaho (R. 79, 117, 123). Needing fuel to reach his destination in Idaho, he landed the aircraft at the Blanding airstrip at approximately 2:30 a.m. (R. 8, 123). Finding no one present to help him refuel the plane, the appellant taxied it to the end of the airstrip to wait until daylight (R. 10, 129, 130). After observing the appellant's conduct at the airstrip, the airport manager called the police because he was suspicious that the appellant wanted to rob something from the other planes tied down at the airstrip (R. 11). Three policemen arrived at the airport to investigate (R. 12). While two of them approached the aircraft by driving a police car along the runway with the headlights off, the third officer on foot circled behind the aircraft and approached it from an

opposite direction (R. 13, 72). The three officers reached the aircraft simultaneously (R. 39). The officers in the police car turned on their headlights and shined a spotlight on the plane while the third officer closed in on foot with a gun in his hand (R. 39, 132). The appellant knew he was surrounded by police and felt that if he had moved, they would have shot him (R. 133). One of the policemen arriving in the police car located the appellant some thirty feet from the plane (R. 40, 63) and asked him for some identification (R. 42, 146) while the officer behind the appellant asked him about the contents of the airplane (R. 147). The appellant responded that the plane was "loaded with pot" (R. 52, 149). The police officers then placed the appellant under arrest (R. 52), read him the Miranda warning (R. 53), searched his person (R. 54), handcuffed him, and placed him in the patrol car (R. 55). One officer then radioed to Monticello for more assistance (R. 55, 67). Some minutes later, two more officers arrived (R. 68). Traveling from Monticello to the Blanding airport, the two officers passed by the offices of two justices of the peace (R. 67, 116). Yet, they failed to obtain a search warrant (R. 68).

The policemen approached the plane, smelled an odor which they believed to be marijuana, and observed a number of packages wrapped in plastic located in the interior of the plane (R. 56). They searched the plane, took photographs (R. 68, 69), and removed the packages (R. 80, 102). All this was done without a search warrant (R. 68).

The packages were found to contain marijuana (R. 92).

On the 15th day of January, 1975, the Honorable Edward Sheya, Judge for the District Court of San Juan County, Utah, sitting without a jury, found the appellant guilty of illegal possession of a controlled substance with intent to distribute for value in violation of Utah Code Annotated § 58-37-8 (1)(a)(ii) (Supp. 1973) (R. 159). On the 19th day of February, 1975, the appellant was sentenced to not more than five years in the Utah State Prison (R. 186).

In finding the appellant guilty, the lower court determined that the appellant's statement that the plane was "loaded with pot" was admissible as evidence regardless of the fact that when the statement was made the appellant was surrounded by police officers, that one of the officers had a gun in his hand, and that at this time no Miranda warning had been given (R. 52). The lower court further found the appellant guilty of an intent to distribute a controlled substance despite the appellant's contention that he intended to distribute it only in Idaho (R. 161). Finally, the court allowed a large quantity of marijuana to be admitted as evidence against the appellant even though it had been obtained by a search and seizure conducted without a search warrant (R. 172).

ARGUMENT

POINT I

THE EVIDENCE OBTAINED FROM THE AIRPLANE OF WHICH THE APPELLANT WAS THE PILOT IS INADMISSIBLE AS THE PRODUCT OF AN ILLEGAL SEARCH

AND SEIZURE BECAUSE THERE WAS NO SEARCH WARRANT AND BECAUSE A SEARCH WARRANT MUST BE OBTAINED INCIDENT TO ARREST UNLESS EXIGENT CIRCUMSTANCES ARE SUCH AS TO JUSTIFY A SEARCH AND SEIZURE WITHOUT FIRST OBTAINING A SEARCH WARRANT.

In order to afford the appellant's uniform constitutional safeguards under the Fourth Amendment of the United States Constitution, the United States Supreme Court has ruled that standards and criteria set forth in the Constitution as interpreted by the Supreme Court are binding upon state courts. This rule is set forth in Ker v. California, 374 U.S. 23 (1963). All eight members participating in the decision of this Court agreed that they would review the California case to determine whether the "constitutional criteria established by this Court have been respected" with regard to search and seizure procedures (374 U.S. at 34).

On numerous occasions the United States Supreme Court has stated the general requirement that searches and seizures are to be made only with a search warrant, unless an emergency situation arises which would justify a search and seizure without a warrant. The Court in McDonald v. United States, 355 U.S. 451 at 455, 456 (1948) stated:

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. . . . We cannot be true to that constitutional requirement and excuse the absence of a search warrant without showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative. (Emphasis added.)

In the instant case, the challenged search and seizure was made without a search warrant. Therefore, according to McDonald, supra, the respondent had the burden of proving that there was a "grave emergency" situation justifying the absence of a warrant.

The Supreme Court in Chimel v. California, 395 U.S. 752 (1969), held that there are two grave emergency situations, i.e., "exigent circumstances," whereby a police officer may search a person he has just arrested and the area within the arrestee's immediate control without a search warrant:

> **(1)** Where the police officer is searching to remove any weapons in order to protect himself and prevent the suspect's escape;
>
> **(2)** Where the police officer is searching for incriminating evidence in order to prevent its concealment or destruction.

The Supreme Court in Chimel, supra, found that the search of the defendant's home and cars after he had been arrested on the doorstep of his home was unconstitutional. In reversing the defendant's conviction, the Court said:

> The search here went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence. There is no constitutional justification, in the absence of a search warrant, for extending the search beyond that area. 395 U.S. at 768.

The United States Tenth Circuit Court of Appeals has explicitly followed Chimel, supra. In United States v. Baca, 417 F.2d 103 (10th Cir. 1969), a post-Chimel decision, the defendant had been arrested for parole

violation at his home. At the time of his arrest the officers observed some drug paraphernalia and proceeded to search the premises without a search warrant. Heroin was seized during the warrantless search. The Tenth Circuit in holding that the search and seizure of the heroin was unlawful said:

> The area within the immediate control of the defendant may be searched and evidence or weapons seized without a warrant when made incident to a lawful arrest. . . . Moreover, it cannot be said that the night stand, under the bed or any similar area was under any type of control by Baca inasmuch as he was handcuffed with his hands behind his back and was unable to even dress himself. 417 F.2d at 105.

The court went further to say:

> The rule has been long established that whenever practicable an officer must secure a search warrant. . . . It is difficult to understand how or why it was not practicable for one of the five officers to obtain a search warrant based on probable cause resulting from the finding of the two vials and narcotics paraphernalia. 417 F.2d at 105-106.

In the instant case, testimony by the appellant and police officers indicated that the appellant was some twenty to thirty feet away from the airplane when the arrest was made (R. 63). The police then reasonably searched the appellant for any weapons in order to protect themselves (R. 54). This search of the person of the appellant was justified by both Chimel and Baca, supra. However, after the police

handcuffed the appellant and placed him in the police car (R. 55), there was no further justification under the rationale of Chimel and Baca, supra, to search the airplane which was out of the immediate control of the appellant (R. 90, 103). After the police searched the appellant's person in order to protect themselves, no further exigent circumstances existed. In searching the airplane, the police were in no way attempting to protect themselves or to prevent the appellant's escape. Furthermore, there could have been no apprehension on their part that the evidence in the airplane would be destroyed or concealed because, as in Baca, supra, where the arrestee was handcuffed and in custody, the appellant in the instant case was likewise handcuffed and placed in the police car. According to Chimel and Baca, supra, a search warrant is absolutely mandatory for a search extending beyond the area within the appellant's immediate control.

Evidence from the trial further indicated that before the airplane was searched, the arresting officer telephoned Sheriff Wright in Monticello to assist in the search of the airplane (R. 87). The contents of the airplane were not seized until after Sheriff Wright arrived at the Blanding airport (R. 90). Sheriff Wright testified that there were two justices of the peace in Blanding, a mere four miles from the Blanding airport (R. 67, 116). In other words, the appellant was handcuffed and in custody of three policemen while Sheriff Wright was traveling from Monticello to the Blanding airport and passing right by the offices of two magistrates authorized to issue search warrants. Yet, neither Sheriff Wright nor any of the policemen obtained a

search warrant which would have been practicable and convenient under the circumstances. Similar circumstances existed in Baca, supra, wherein the court stated:

> It is difficult to understand how or why it was not practicable for one of the five officers to obtain a search warrant based on probable cause . . . . 417 F.2d at 105-106.

In the instant case it was not only practicable as required by Baca, supra, but also convenient for the officers to obtain a search warrant before searching the airplane which was some thirty feet from the appellant who was handcuffed and in custody. The failure of the officers to obtain the mandatory search warrant was a direct violation of the appellant's Fourth Amendment rights against unreasonable searches and seizures.

Chimel and Baca, supra, dealt with the legality of a "premise search"; however, it is clear that the same limitations apply to "vehicle searches." In United States v. McIntyre, 304 F. Supp. 1244 (E.D. La. 1969), a post-Chimel case, the defendants were arrested twenty feet from their automobile, but the police searched the vehicle anyway without a search warrant. The Court upheld the motion to suppress by holding:

> [T]he situation did not demand immediate seizure of whatever was inside their vehicle. Defendants, apparently unarmed and standing twenty feet away, could not have reached objects in the car, either to threaten the policemen or to destroy evidence. With three officers and two police cars available to guard the car and the

> suspects, there was no excuse for failing to obtain a warrant before searching the automobile. 304 F. Supp. at 1246. (Emphasis added.)

Since the limitation of Chimel, supra, has been applied to automobile searches, there is no reason not to apply it to airplane searches. In the instant case where the appellant was arrested thirty feet away from the airplane, handcuffed, and placed in the custody of three policemen, there was no excuse for failing to obtain a search warrant before searching the airplane.

The Supreme Court in Coolidge v. New Hampshire, 403 U.S. 443 (1971), stated that simply because contraband is in plain view incident to a lawful arrest, the contraband cannot be seized without a search warrant absent exigent circumstances, regardless of the fullest amount of probable cause. Coolidge, supra, stands for the proposition that a seizure of contraband in plain view where no search is necessary is subject to constitutional limitations:

> The limits on the doctrine [plain view] are implicit in the statement of its rationale. The first of these is that plain view alone is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.' Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has

> repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure. 403 U.S. at 468. (Emphasis added.)

The facts of the instant case indicate that the police could see plastic bags in the airplane by looking through the windows and could also smell the presence of marijuana (R. 88). Thus, they had probable cause to believe that the airplane carried contraband because of the "incontrovertible testimony of their senses." Yet, the Court in Coolidge, supra, stated that even with indisputable probable cause, the police could not seize contraband in plain view unless exigent circumstances existed. Because exigent circumstances did not exist, in that there was no possibility that the evidence would be destroyed, the seizure of the marijuana without a search warrant was illegal and the marijuana should not be admissible as evidence against the appellant.

While Coolidge, supra, involved a seizure of automobiles in plain view, that case has also been applied to evidence in plain view within an automobile. It is therefore reasonable to apply the Coolidge limitations to contraband in plain view in airplanes. In a recent Montana case, State v. Amor, 520 P.2d 773 (Mont. S. Ct. 1974), the police looked through the windows of a parolee's parked car and saw what appeared to be a box of rifle ammunition on the seat. Knowing that parolees were not permitted to possess weapons, the police seized the box of ammunition and further searched the vehicle without a search warrant. The Supreme

Court of Montana, in affirming the defendant's motion to suppress the evidence, stated:

> In the instant case the presence of the ammunition box in the automobile and knowledge that Amor, the registered owner, was a parolee who matched the general description of the burglar were facts contributing to the existence of probable cause, not exigent circumstances. . . . In the instant case we find that it was both practicable and mandatory that the officers obtain a valid warrant before conducting a search of Amor's parked, unoccupied automobile. 520 P.2d at 775. (Emphasis added.)

The instant case is similar to Amor, supra, because in both factual situations probable cause had been established. And Amor, supra, held that existence of probable cause did not permit the officers to seize evidence in plain view inside a vehicle without a search warrant. It must be remembered that plain view alone is not an exigent circumstance. Rather, exigent circumstances exist only when the officers are trying to protect themselves or prevent the destruction of evidence (Chimel, supra). In the instant case there were no exigent circumstances when the officers seized the marijuana which was in plain view in the airplane. The officers relied on the plain view doctrine alone to justify their warrantless search and seizure which was illegal according to the standards of Chimel, Coolidge, and Amor, supra.

In the instant case the trial court justified the seizure of the marijuana from the airplane by relying on three Utah cases dealing with

search and seizure (R. 162, 163, 164): State v. Allred, 16 Utah 2d 41, 395 P.2d 535 (1964); State v. Shields, 28 Utah 2d 405, 503 P.2d 848 (1972); and State v. Martinez, 28 Utah 2d 80, 498 P.2d 651 (1972).

Of course, Allred, supra, is no support for the trial court's position in the instant case because Allred, supra, was decided prior to and overruled by both Chimel and Coolidge, supra.

Neither is Shields, supra, support for the trial court's position in the instant case because there were exigent circumstances present in Shields, supra, as required by Chimel and Coolidge, supra, which justified the warrantless search of an automobile which was stopped on the highway. In Shields, supra, this court held:

> [A] search warrant is unnecessary where there is probable cause to search an automobile stopped on the highway, for the car is movable, the occupants alerted, and the car's contents may never be found again if a warrant must be obtained. 503 P.2d at 849. (Emphasis added.)

Even though this court used the phrase "probable cause" and not the phrase "exigent circumstances" in Shields, supra, this court still found exigent circumstances to exist because it found that alerted occupants could have moved the car and its contents before a warrant could have been obtained. No such exigent circumstances existed in the instant case because the appellant was the sole occupant of the airplane. He was handcuffed and in custody. Surely he posed no threat that the airplane and its contents would be moved or destroyed.

Martinez, supra, the remaining case cited in support of the trial court's position in the instant case, was decided after Coolidge, supra, which held that a warrantless seizure of evidence in plain view where no search was necessary may only be valid with the presence of exigent circumstances. The scant record of Martinez, supra, (less than one page) does not indicate whether exigent circumstances existed. Nor did this court cite therein any cases whatsoever to justify its bare holding that seizure of evidence in plain view in an automobile was lawful.

If indeed no exigent circumstances existed in Martinez, supra, this court's holding therein is clearly contrary to the federal standards in Coolidge, supra. And Ker, supra, holds that federal standards must be applied to state cases.

In both Amor (Montana) and Martinez (Utah), supra, the incriminating evidence was seen in plain view through the window of an unoccupied parked automobile and was seized without a search warrant. In Amor, supra, the Montana Supreme Court following Ker, supra, specifically cited Coolidge, supra, in holding that if exigent circumstances did not exist there could be no lawful seizure of evidence even though it was in plain view.

A search and seizure of evidence in plain view incident to a lawful arrest is valid only when circumstances are such that the police are trying to protect themselves, trying to prevent escape, or trying to prevent the concealment or destruction of incriminating evidence. Chimel, supra. These are the only exigent circumstances which justify a seizure of evidence

in plain view without a search warrant. Contraband in plain view establishes probable cause for arrest but does not alone justify a warrantless seizure of the contraband. Exigent circumstances must also exist. Coolidge, supra. No exigent circumstances existed in the instant case at the time of the search or seizure; i.e., the officers were not attempting to protect themselves; the officers were not attempting to prevent the escape of the appellant; the officers were not attempting to prevent the airplane from being moved; nor were the officers attempting to prevent the destruction of the marijuana. Therefore, the seizure of the marijuana in the instant case was unreasonable and unlawful; the marijuana should not have been admitted into evidence at the trial; and the appellant's conviction and sentence should be reversed by this court.

POINT II

APPELLANT WAS DENIED HIS FIFTH AMENDMENT RIGHTS AS DEFINED BY MIRANDA v. ARIZONA BECAUSE HE WAS INTERROGATED WHILE IN CUSTODY WITHOUT HAVING BEEN INFORMED OF HIS MIRANDA RIGHTS.

Under the doctrine of Miranda v. Arizona, 384 U.S. 436 (1966), appellant is entitled by the Fifth Amendment, when in custody and prior to any interrogation, to be informed of his "right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." 384 U.S. at 444. The evidence clearly reveals that at the time appellant made the statement that the airplane was "full of pot" (R. 52)

no Miranda warning had been given to him by any officer.

The sole significant issue pertaining to the Miranda warning as applied to the instant case is whether there was custodial interrogation. In deciding Miranda, supra, the Supreme Court was explicit in its definition of the term "custodial interrogation" by stating:

> By custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. 384 U.S. at 444.

In the instant case the appellant was surrounded by three law enforcement officers at gun point (R. 39, 132). The appellant knew he was surrounded by police and felt that if he had moved, they would have shot him (R. 133). The appellant was indeed in custody or otherwise deprived of his freedom of action in a significant way as required by Miranda, supra, after which one law enforcement officer asked the appellant for some identification (R. 42, 146), and another law enforcement officer asked, "What is in the airplane?" (R. 147). The appellant responded that the airplane was "loaded with pot" (R. 52, 149). No Miranda warning had yet been given the appellant by the law enforcement officers. The appellant was in custody before the questioning was initiated by the law enforcement officers.

Courts interpreting Miranda, supra, have repeatedly stressed that the emphasis is upon the person's reasonable belief as to whether he was free to leave. In People v. Ellingsen, 65 Cal. Rptr. 744 (1968), a 16 year old boy was taken to the police station for questioning with regard

to the murder of his sister. The prosecutor later tried to use the boy's statements as evidence at his murder trial. The issue was whether the boy was in custody. The California Court of Appeals, deciding that he was, stated:

> For a person to be regarded as being 'in custody' for purposes of giving required warnings under the Miranda decision, it is not necessary that he be under arrest and custody occurs if the suspect is physically deprived of freedom in any significant way or is led to believe, as a reasonable person, that he is so deprived. 65 Cal. Rptr. at 744.

At the time the incriminating statement was made by the appellant in the instant case, the appellant reasonably believed that his freedom of action was significantly impaired (R. 133, 135) within the meaning of Ellingsen, supra.

Therefore, the appellant's Fifth Amendment rights have been violated, his incriminating statement should not have been admitted in evidence at the trial, and his conviction and sentence by the lower court should be reversed.

POINT III

THE DISTRICT COURT FOR UTAH LACKED JURISDICTION TO PUNISH THE APPELLANT FOR ILLEGAL POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE FOR VALUE BECAUSE HE INTENDED TO DISTRIBUTE THE CONTROLLED SUBSTANCE ONLY IN IDAHO.

To convict appellant for illegal possession of a controlled

substance with intent to distribute for value under Utah Code Annotated § 58-37-8 (1)(a)(ii) (Supp. 1973), the respondent must prove beyond a reasonable doubt that the appellant had an intent to distribute a controlled substance in Utah. The trial court found that the appellant was transporting marijuana to Idaho and merely stopped in Blanding, Utah, to refuel his airplane (R. 160). The intent to distribute pertained only to Idaho, and the record is clear that appellant had no intent to distribute marijuana in Utah.

There can be no presumption that the appellant intended to distribute in Utah merely because he was in possession of a large quantity of marijuana within Utah. While Utah courts are silent on this point, recent case law of other jurisdictions concludes that intent to distribute cannot be presumed from mere possession. In State v. O'Meally, 95 Idaho 202, 506 P.2d 99 (1973), the defendant was charged with possession with intent to deliver 38 tablets of amphetamine sulphate, .061 grams of cocaine hydrochloride, and 62.23 grams of marijuana. In affirming the dismissal of the complaint, the Idaho Supreme Court stated that an intent to deliver a controlled substance could not be inferred from mere possession. In a similar case, Redden v. State, 281 A.2d 490 (Del. Supr. 1971), the defendant was convicted of possession with intent to sell 12 ounces and 29 sealed envelopes of marijuana. In reversing his conviction, the Delaware Supreme Court stated:

> It was, of course, incumbent upon the state to prove the element of intent to sell, as well as other elements of the

> offense by competent evidence sufficient to justify submission of the issue to the jury. . . . We hold, therefore, that there was not sufficient evidence of intent to sell in this case to warrant submission of the case to the jury. 281 A.2d at 491.

In State v. Fitzpatrick, 491 P.2d 262 (Wash. App. 1972), a very similar fact situation to the instant case was presented. The defendant was convicted of possession with intent to sell after having transported 76 bricks of marijuana by plane across the Canadian border in Washington. A Washington statute provided for a presumption of intent to sell from the fact of possession of more than 40 grams of marijuana. Yet the court, reversing the defendant's conviction, stated:

> The trier of fact need give such a presumption only such weight as it seems to merit. . . . Where a defendant's acts are patently equivocal, a criminal intent to sell the marijuana cannot be inferred from the overt act of possession of that amount alone. 491 P.2d at 266-267.

The Utah Controlled Substances Act, Utah Code Annotated § 57-37-8, under which appellant was convicted, includes no statutory presumption of intent to sell from the fact of mere possession. Furthermore, O'Meally, Redden, and Fitzpatrick, supra, indicate that the respondent cannot make such a presumption. In the instant case, absolutely no evidence whatsoever was offered by the respondent of the appellant's intent to distribute in Utah. Simply because appellant was in possession of a large quantity of marijuana within Utah boundaries

does not mean that he intended to distribute marijuana within Utah.

The lower court found that Utah had jurisdiction to punish the appellant for intent to deliver a controlled substance in Utah, even though he intended to transport the marijuana only to Idaho (R. 160). The lower court relied in pertinent part upon Utah Code Annotated § 76-1-201 (2), which states that a person is subject to prosecution in this state if the offense is committed wholly or partially within this state. Utah Code Annotated § 76-1-201 (2) further provides:

> (2) An offense is committed partly within this state if either the conduct which is an element of the offense, or the result which is such an element, occurs within this state.

Despite this statute, Utah lacks jurisdiction to punish the appellant for an intent to distribute outside Utah's borders because the appellant's conduct nor its result was an element of the offense to distribute in Idaho. California has a statute almost identical to Utah's jurisdictional statute. Subdivision (1) of Section 27 of the California Penal Code provides that persons may be punished "under the laws of this state" if they "commit, in whole or in part, any crime within this state." Section 778(a) of that code further provides:

> Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this state, such person is punishable for such crime in this state in the same manner as if the

> same had been committed entirely within this state.

The case of People v. Buffum, 256 P.2d 317 (Cal. 1953), interprets the California statute and indicates when a state may punish a person when that person intends to commit a crime outside the boundaries of that state. In Buffum, supra, the defendants were doctors who were residents of California. They performed abortions on several women in Mexico. The trial court convicted defendants of conspiracy to use certain means to induce miscarriages. Yet, the defendants did not intend to commit abortions in California, only in Mexico. In reversing their convictions, the California Supreme Court stated:

> To read such a statute as authorizing punishment by one state of acts which do not amount to an attempt but are merely preparatory to the commission of a crime in another state would seem tantamount to an effort to regulate conduct in the other jurisdiction. 256 P.2d at 320.

The California court further held that before it could have jurisdiction over an individual intending to commit a crime beyond its borders, the acts of the defendant must have constituted at least an attempt to commit the offense. An intent to commit a crime outside the boundaries of California did not give the California court jurisdiction.

The appellant in the instant case did not attempt or even intend to distribute marijuana within Utah. Therefore, according to Buffum, supra, a case dealing with California statutes similar to those Utah

statutes under which the lower court claimed jurisdiction over the appellant, Utah courts should not have jurisdiction over a crime intended to take place outside Utah.

A case similar to Buffum, supra, is People v. Werblow, 241 N.Y. 55, 148 N.E. 786 (1925). The court in that case dealt with a New York statute which gave New York courts jurisdiction of "a person who commits within the state any crime, in whole or in part." 148 N.E. at 788. The New York court in reversing the conviction of defendant who conspired to commit grand larceny outside the boundaries of New York stated:

> We think a crime is not committed either wholly or partly in this state, unless the act within this state is so related to the crime that if nothing more had followed, it would amount to an attempt. 148 N.E. at 789.

It is clear that the appellant in the instant case did nothing which would amount to an attempt to distribute a controlled substance in Utah. According to Buffum and Werblow, supra, in order for a state to have jurisdiction over a person intending to commit a crime outside the boundaries of that state, the person must have performed an act within the state amounting to an attempt to commit the crime for which he is charged. The appellant in the instant case is charged with intent to distribute a controlled substance in Utah. Utah has claimed jurisdiction, notwithstanding the fact that the appellant intended to distribute outside Utah and in no way attempted to distribute in Utah. In light of the fact that Buffum and Werblow, supra, hold that an intent alone to commit a crime outside the borders of a

state does not give that state jurisdiction, the conviction of the appellant for intent to distribute a controlled substance must be reversed for lack of jurisdiction.

CONCLUSION

The appellant was denied his Fourth Amendment right against unreasonable search and seizure.

The appellant was denied his Fifth Amendment right against self-incrimination.

The appellant was denied his Fifth and Fourteenth Amendment rights against due process and equal protection of the law because of the lower court's lack of jurisdiction.

Therefore, the appellant's conviction and sentence by the lower court should be reversed.

DATED this 18th day of July, 1975.

Respectfully submitted,

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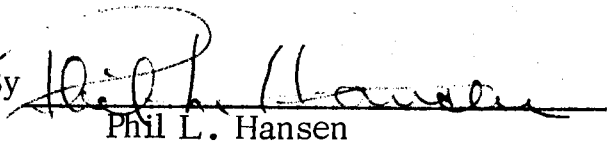
By 
Phil L. Hansen

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellant's Brief was served on counsel for the respondent, Vernon B. Romney, Utah State Attorney General, by delivering three (3) copies thereof to his office at 236 State Capitol Building, Salt Lake City, Utah 84114, on the 18th day of July, 1975.